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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 943.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALFRED SHELLEY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 24, 1913.

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1 *Writ of error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York before you, or come of you, between the United States of America and Alfred Shelley, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

2 Witness, the honorable Edward D. White, Chief Justice of the United States, the 14 day of January, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the District Court.

Allowed by—
LEARNED HAND,
U. S. District Judge.

Clerk's certificate.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 5 to 19, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the United States of America, plaintiff in error, against Alfred Shelley, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District

of New York, this 21st day of January, in the year of our Lord
3 one thousand nine hundred and thirteen, and of the independence of the United States the one hundred and thirty-seventh.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

4 (Indorsed:) Orig. Form No. 336. U. S. Supreme Court, United States of America, plff. in error, versus Alfred Shelley, deft. in error. Writ of error. Henry A. Wise, United States attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Jan'y 14, 1913. Robt. M. Moore, attorney for deft. in error. U. S. District Court. Filed Jan. 14, 1913. M. S. D. of N. Y.

5 *Indictment.*

District Court of the United States of America for the Southern District of New York.

Of the November term, in the year of our Lord one thousand nine hundred and twelve.

SOUTHERN DISTRICT OF NEW YORK, ss:

The jurors of the United States of America within and for the district aforesaid, on their oath present that Alfred Shelley, late of the city and county of New York, in the district aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and eleven, at the Southern District of New York and within the jurisdiction of this court, did unlawfully engage in the manufacture of opium for smoking purposes without having given the bond required by the Commissioner of Internal Revenue, as required by law; that is to say, the said defendant in manner and form aforesaid did engage in the manufacture of opium for smoking purposes, in and by employing and using the process by means of which crude, or gum, opium is cut into small pieces, and having had water added to it is permitted for a period of time to soak in such water in any receptacle or vessel until the dissolution of the said crude, or gum, opium is accomplished; and, further, by means of which the said aqueous solution of crude, or gum,
6 opium is strained and purified so that all matter foreign to the opium, such as leaves, twigs, and dirt is removed therefrom; the said aqueous solution thus strained and purified is heated and cooked in any receptacle or vessel for a period of time over a slow fire until there remains, by reason of the evaporation, among other things, of a part of its aqueous content, a product which resembles in appearance and consistency thick molasses, and which product is of such consistency as is best fitted and suited for smoking purposes, and which said product is smoking, or prepared, opium, and opium

for smoking purposes, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

SECOND COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Alfred Shelley, late of the city and county of New York, in the district aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and twelve, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully engage in the manufacture of opium for smoking purposes without having given the bond required by the Commissioner of Internal Revenue, as required by law; that is to say, the said defendant in manner and form aforesaid did engage
in the manufacture of opium for smoking purposes, in and by
7 employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for smoking purposes, against the peace of the United States and their dignity, and contrary to the form of the statute of the United Staes in such case made and provided.

8 THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Alfred Shelley, late of the city and county of New York, in the district aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and twelve, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully engage in the manufacture of opium for smoking purposes, without having given the bond required by the Commissioner of Internal Revenue, as re-

quired by law; that is to say, the said defendant in manner and form aforesaid, did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the
9 said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

FOURTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Alfred Shelley, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and twelve, at the Southern District of New York and within the jurisdiction of this court, did unlawfully engage in the manufacture of opium for smoking purposes, without having given the bond required by the Commissioner of Internal Revenue, as required by law; that is to say, the said defendant in manner and form aforesaid, did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means
10 of which crude or gum opium is cut into small pieces, and is, soaked for a period of time, and until dissolved, in water in any receptacle or vessel; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is soaked until dissolved in water in any receptacle or vessel; said aqueous solution of yen shee is then strained and purified

by any means so that there is removed therefrom everything except the water and opium which is contained in the said solution of yen shee, and which said substances consist, among other things, of the mineral ash produced by the partial combustion in the course of the smoker using the said prepared, or smoking, opium for smoking purposes; and the said process is further, that the said solution of yen shee thus strained and purified is mixed with the aforesaid aqueous solution of crude, or gum, opium, the said aqueous solution of gum, or crude, opium having theretofore been strained and purified to the end that there is removed from the said solution all matter foreign to the said gum, or crude, opium, such matter consisting, among other things, of leaves, twigs, and other refuse matter; and the said process is, further, that the strained and purified solutions of gum, or crude, opium, and yen shee, mixed as aforesaid, are heated and cooked in any receptacle or vessel over a slow fire for a period of time and until there remains, as the result of the evaporation, among other things, of a part of the aqueous content of the said mixed solution, a product which resembles in appearance
11 and consistency thick molasses, and which is prepared, or smoking, opium, and opium for smoking purposes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

HENRY WISE, *United States Attorney.*

(Endorsed:) U. S. District Court. The United States of America *vs.* Alfred Shelley. Indictment. (Sec. 36, act Oct. 1, 1890.) Henry A. Wise, U. S. Attorney. A true bill. James A. Mulligan, foreman. U. S. District Court, S. D. of N. Y., filed Nov. 15, 1912. 1912. Dec. 19. Deft. arraigned; pleads not guilty to counts one and four. 1912. Dec. 19. Demurrer as to counts two and three. Demurrer sustained. 1913. Jan. 2, filed demurrer, nunc pro tunc as of Dec. 19, 1912. 1913. Jan. 10, filed order sustaining demurrer as to counts two and three.

12 *Demurrer.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
ALFRED SHELLEY.

The defendant in the above-entitled action hereby demurs to the "second" count of the indictment found and filed against him herein at the November term of this court, 1912, upon the ground that the said count or indictment does not state facts sufficient to constitute a crime.

And the defendant also hereby demurs to the "third" count in the said indictment upon the ground that the said count or indictment does not state facts sufficient to constitute a crime.

Dated, December 21st, 1912.

ROBERT M. MOORE,
Defendant's Attorney,
55 Liberty St., New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 2, 1913, as of Dec. 19, 1912.

13 *Order sustaining demurrer.*

At a stated term of the United States District Court for the Southern District of New York, held on the 9th day of January, 1913, at the U. S. courthouse and post office bldg. in the borough of Manhattan, city of New York.

Present: Hon. Learned Hand, district judge.

UNITED STATES
v.
ALFRED SHELLEY.

An indictment having been duly filed herein on the 15th day of November, 1912, against the defendant, Alfred Shelley, founded upon section 36 of the act of Congress approved October 1, 1890 (26 Stat. L., 567).

And the defendant, Alfred Shelley, having duly entered a plea of not guilty to the first and fourth counts of the said indictment, and having duly demurred to the second and third counts thereof,

And it appearing, upon construction of the statute upon which the said indictment was founded, that neither the second nor the third counts thereof, to which defendant duly demurred, sets forth a violation of the provisions of the said statute, and it being so decided and adjudged, it is

14 Now, after hearing Henry A. Wise, U. S. attorney, in opposition, on motion of Robert M. Moore, attorney for the defendant, Alfred Shelley,

Ordered and adjudged that the said demurrer to the said second and third counts of the indictment herein be, and it hereby is, in all respects sustained, and it is further

Ordered and adjudged that the defendant be, and he hereby is, admitted to bail on his own recognizance.

LEARNED HAND, *U. S. D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 10, 1913.

15 *Petition for writ of error.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
ALFRED SHELLEY.

And now comes the United States of America, by its attorney, Henry A. Wise, Esq., and complains that in the record and proceedings had in this cause, and in the judgment sustaining the defendant's demurrer to the second and third counts of the indictment herein and dismissing said indictment as to said counts, manifest error hath happened, as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated this 13th day of January, 1913.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for Petitioner.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 14, 1913.

16 *Assignments of error.*

United States District Court, Southern District of New York.

UNITED STATES
vs.
ALFRED SHELLEY.

And now comes the United States, by Henry A. Wise, United States attorney for the Southern District of New York, its attorney, and files the following assignments of error:

I.

That the United States District Court for the Southern District of New York erred in sustaining the demurrer interposed by the defendant to the second and third counts of the indictment filed in this cause on the 15th day of November, 1912, in and by construing section 36 of the act of Congress of October 1, 1890 (26 Stat. L., 567), so as to hold that the facts stated in said second and third counts of said indictment do not constitute a violation of the said section of the said act of Congress.

II.

That the United States District Court for the Southern Dis-
17 trict of New York erred in declining and refusing to overrule the demurrer interposed by the defendant to the second and third counts of the indictment filed in this cause on the 15th day of November, 1912, and to sustain said counts of said indictments in and by construing section 36 of October 1, 1890 (26 Stat. L., 567), so as to hold that the facts stated in said second and third counts of said indictment do constitute a violation of the said section of the said act of Congress.

Wherefore the plaintiff prays that the judgment and order of said court be reversed and that this cause be remanded for further proceedings before the said United States District Court for the Southern District of New York, in accordance with law.

Dated New York, January 13, 1913.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for Plaintiff. Office and Post-Office Address: Room 50, U. S. Court and P. O. Building, Borough of Manhattan, City of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 14, 1913.

18 By the Honorable Learned Hand, one of the judges of the District Court of the United States for the Southern District of New York.

To Alfred Shelley, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, on the 13 day of February, A. D. 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district above named, this 14 day of January, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the United States the one hundred and thirty-seventh.

[SEAL.] LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

19 (Indorsed:) Orig. Form No. 336. U. S. Supreme Court. United States of America, plff. in error, versus Alfred Shelley, deft. in error. Citation. Henry A. Wise, United States attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Jan'y 14, 1913. Robt. M. Moore, attorney for deft. in error. U. S. District Court. Filed Jan. 14, 1913. M. S. D. of N. Y.

20 (Indorsed:) Supreme Court of the United States. United States of America, plff. in error, vs. Alfred Shelley, deft. in error. Transcript of record. Error to the District Court of the United States for the Southern District of New York.

(Indorsement on cover:) File No. 23518. S. New York. D. C. U. S. Term No. 943. The United States, plaintiff in error, vs. Albert Shelley. Filed January 24th, 1913. File No. 23518.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

13

No. 943.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error,*

v.

ALFRED SHELLEY, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case be advanced for early hearing since it is here under the Criminal Appeals Act; and that it be placed on the *summary docket,* since the question involved is simple.

Shelley was indicted for manufacturing smoking opium without paying the internal-revenue tax, and without complying with the regulations, imposed by sections 36 and 37 of the act of October 1, 1890, c. 1244, 26 Stat. 620. His opium was produced by a process in which other substances than crude opium (for example, yen shee, which is the residue after

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opium has been smoked) were used, and the demurrer was sustained below on the ground that "smoking opium" under the act of October 1, 1890, means only opium produced from crude opium. This is the only question involved and, as can be seen, it involves a construction of the statute on which the indictment is founded.

Opposing counsel concur in this motion.

WM. MARSHALL BULLITT,

Solicitor General.

FEBRUARY 3, 1913.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ALFRED SHELLEY.
No. 943.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF CASE.

The defendant in error was indicted for manufacturing smoking opium without giving a bond to the Commissioner of Internal Revenue, as required by section 36 of the act of October 1, 1890 (26 Stat., 620), which provides:

> That an internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue.

The act (sec. 40) imposes a penalty for its violation of not more than $1,000, or imprisonment not more than one year, or both.

The indictment was in four counts (R., 2–5), setting forth in each count a different process by which defendant produced his opium. The first and fourth counts described processes in which crude opium was used, and defendant entered a plea of not guilty to these.

The second and third counts described processes by which smoking opium was produced *without* the use of crude opium—in the one case by the use of yen shee, which is the residue after opium has been smoked, and in the other by the use of yen shee together with a high grade of smoking opium after the latter had been dissolved in water. The trial court sustained a demurrer to these counts on the ground that the facts set forth therein did not constitute a violation of the statute. (R., 6.)

As the decision on the demurrer involved a construction of the statute upon which the indictment was founded, the case is brought here for review under the criminal appeals act of March 2, 1907 (34 Stat., 1246).

The two counts in question are as follows:

SECOND COUNT.

> And the jurors aforesaid, on their oath aforesaid, do further present that Alfred Shelley, late of the city and county of New York, in the district aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and twelve, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully engage in the

manufacture of opium for smoking purposes without having given the bond required by the Commissioner of Internal Revenue, as required by law; that is to say, the said defendant in manner and form aforesaid did engage in the manufacture of opium for smoking purposes, in and by employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for smoking purposes,

against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Alfred Shelley, late of the city and county of New York, in the district aforesaid, yeoman, heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand nine hundred and twelve, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully engage in the manufacture of opium for smoking purposes, without having given the bond required by the Commissioner of Internal Revenue, as required by law; that is to say, the said defendant in manner and form aforesaid, did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist

of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

QUESTION PRESENTED.

The sole question argued below and intended to be presented here by the assignments of error (R., 7) is whether the acts of defendant as set forth in the third and fourth counts of the indictment constitute the manufacture of opium for smoking purposes within the meaning of the statute.

ARGUMENT.

In sustaining the demurrer to the second and third counts of the indictment in this case the district court perforce followed the decision of the Circuit Court of Appeals in a previous prosecution of the

same party arising out of the same state of facts. (*Shelley* v. *United States*, 198 Fed., 88.) It will be noted that Judge Noyes dissented in that case.

In the case referred to the majority of the Circuit Court of Appeals held that the statute applied only to the manufacture of smoking opium from "crude" opium. This is manifestly reading into the statute a word that is not there, and which is not required by any reasonable interpretation thereof. The statute provides that the internal-revenue tax "shall be levied and collected upon all opium manufactured in the United States for smoking purposes." It is the manufacture of opium for smoking purposes that the statute taxes and regulates. It is immaterial under the statute from what substance opium may be manufactured for smoking purposes. The Circuit Court of Appeals assumes that it can only be manufactured from crude opium, but the statute suggests no such limitation, and it is possible that it may be manufactured from a variety of substances.

It appears from an examination of the brief on behalf of Shelley in the Circuit Court of Appeals in the former case that it was contended that the statute only applied to "the manufacturing of opium to be used for smoking purposes;" that "it is the *opium*, the manufacturing of which is prohibited, and the process by which opium is manufactured is well understood, and it is converting the juice of the poppy into the product known as opium."

The Circuit Court of Appeals, in that case, rejected the idea that the statute was limited to the manu-

facture of opium from the juice of the poppy, but imposed a limitation of its own of the same character by holding that it only applied to the manufacture of smoking opium from *crude* opium. It is manifest that, as above stated, the statute covers broadly the manufacture of opium for smoking purposes, regardless of the substance from which it is manufactured. If the treatment of crude opium so that it may be used for smoking purposes, as the Circuit Court of Appeals held, be within the statute, so likewise must the treatment of yen shee, the residue of smoking opium, or the combination of yen shee so treated with smoking opium which has itself been specially treated, as severally described in the third and fourth counts of the present indictment.

As stated in the indictment, yen shee is the residue after opium has been smoked. It is the ashes, and in such form can not be used again for smoking. It has been completely divested of its character as "smoking opium," and has merchantable value only as an essentially raw material. Like crude opium, it must be put through a refining process or manufacture before it can be used by the smoker.

In *Kidd* v. *Pearson* (128 U. S., 1, 20) this court said:

> Manufacture is transformation—the fashioning of raw materials into a change of form for use.

This definition was quoted in *United States* v. *Knight* (156 U. S., 1, 14), where it was recognized that the business of refining sugar was manufacturing.

Bouvier's definition of *manufacture* is—

> To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.

Webster's Dictionary—

> To work, as raw or partly wrought materials, into suitable forms for use.

Worcester's Dictionary—

> The process of making anything by art, or of reducing materials into a form fit for use by the hand, or by machinery.

Applying these definitions in the present case, the conclusion is inevitable that Shelley *manufactured* opium for smoking purposes.

The question here presented arose in *United States* v. *Joe Sing* (Eastern District of Missouri) and *United States* v. *Waldman* (Eastern District of Pennsylvania), where it was held that the production of smoking opium from yen shee is its manufacture within the prohibition of the statute. Reports of these rulings appear in Treasury Decisions, Nos. 1697 and 1765, copies of which are appended hereto.

Hunter v. *Corning* (86 Fed., 913) is analogous. In that case the Circuit Court of Appeals, Seventh Circuit, held that distilled spirits reclaimed from the staves of empty whisky barrels were subject to taxation under the internal revenue laws. Among other things, the court said (p. 916):

> Little credit is due to the lawmaker who is driven to special enactments to supply the defects of a general law on a subject to which

> general provisions are applicable; and when a comprehensive statute has been so framed that, without distortion of its terms, it may be reasonably applied to extraordinary and unexpected conditions, it is no duty of the courts to impose upon it a narrow construction, which will include only anticipated transactions and conduct, leaving evasive schemes and devices, which, though unforeseen, are clearly within the aim of the law, to the awkward and inefficient remedies of special legislation.

These remarks apply with especial force in this case.

It is respectfully submitted that the judgment of the District Court should be reversed.

WILLIAM R. HARR,
Assistant Attorney General.

APPENDIX.

[Reprinted from Treasury Decisions, Internal Revenue, Vol. 14, pp. 64–65.]

(T. D. 1697.)

* * * * *

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI. MAY TERM, 1911.

United States v. *Joe Sing.*

DECISION ON DEMURRER.

I must take the act of Congress as it is, and as I gather from its provisions what the intention of Congress was. Section 36 provides that:

> An internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes.

That means that the raw material that is brought into this country can not be manufactured for smoking purposes unless the manufacturer pays $10 per pound to the Government for so manufacturing.

Congress has seen proper to place a limit upon the persons authorized to engage in such manufacture and has said:

> No person shall engage in such manufacture who is not a citizen of the United States.

Congress evidently had in view people of a class to which this defendant belongs. It requires the man who engages in such business to be a citizen of the

United States. Then it provides that that citizen shall do certain things in the way of keeping books, giving account of the raw material, how much he has, where he got it, from whom he got it, and everything of that sort; and requires him to give a bond.

Congress stops by saying that no alien shall engage in that business in the United States.

Testimony has been introduced here showing that when this defendant's house was visited, the place where he lived, they found this opium undergoing a certain process. Vessels containing the article were on stoves being heated, and among other things found was the refuse or the ashes from the original imported stuff into the United States. That is called, as I understand it, "yenshi"—that is, the ashes. After the preparation upon which an import duty is laid, and which has been paid, is used and smoked, then it leaves these ashes behind. It is shown in the evidence that the ashes thus remaining could not be smoked to amount to anything in their state as left. You would throw it away like you would throw away the ashes from a fireplace—without any use—but by applying another process to it that which remains in the ashes itself may be taken and reused.

It is said here upon the argument that there is no evidence such as was introduced the other day showing that crude material was bought. I am not to pass upon questions of fact, but the testimony of the chemist shows that his analyses consisted of three different kinds of stuff.

I may say now, without going further into this matter, that if this yenshi, which is the ashes, is used with any other material in bringing about a product

that may be smoked, that, in my judgment, is a manufacturing of the material made and smoked.

There is no reason given or nothing shown here why there should be anything done with this imported material that is used for smoking purposes, all ready for being smoked and may be smoked, and when it is smoked there remains the ashes. Then this one that smokes it takes these ashes and mixes it with something—whether a part of the original matter that is sent here for smoking purposes or not, is not altogether clear—but he mixes it, and by using it in that way he reduces it to a pill or a substance that may be smoked.

When he puts it in the shape so that it may be smoked, whether he used it in combination with other things or from the thing itself, I should think that that was manufacturing smoking material. I do not know how they could make it otherwise.

It is very clear from the testimony in the case that this yenshi could not be smoked. It was exhausted for that purpose when it dropped out of the pipe. Then they take it again and make something else out of which they make this pill that they put in the pipe to smoke.

I may be wrong, but my own judgment in answer to this demurrer is that if the facts as disclosed here in the evidence show that this defendant was engaged at the time in the making of this smoking material, he was manufacturing it for the purpose of selling it.

By "manufacturing" is meant "the operation of making wares or any products by hand, machinery, or by other agencies." That is a manufacturer.

I will have to overrule this demurrer, and do so.

[Reprinted from Treasury Decisions, Internal Revenue, vol. 15 (advance sheets), pp. 31-34.]

(T. D. 1765.)

* * * * *

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA. No. 30.

United States v. *Waldman.*

CHARGE OF THE COURT.

MCPHERSON, *Judge:* Gentlemen of the jury, this case depends on a narrow question. There is no law, Federal or State, that makes it a crime to smoke opium; and there is no law, Federal or State, that makes it a crime to manufacture opium for some purposes. The precise offense which is charged in this case—and that is an offense under a Federal statute—is to manufacture opium for smoking purposes. It is no crime to use opium that has already been manufactured. Therefore, if all that this man did was to procure opium that had already been manufactured and to smoke it, he has not been guilty of any offense and is entitled to be acquitted. Upon the other hand, if he did manufacture opium for smoking purposes, then he is guilty, and, of course, must be convicted.

Now the Federal statute lays several restrictions upon the manufacture of opium for smoking purposes. I said a moment ago that it could not be manufactured for smoking purposes under this statute, but this is not quite correct; it can be manufactured for such purposes under certain restrictions. There is a heavy tax upon it, and a bond must be given, and there are various other regulations which must be complied with, and the manufacturer must also be a

citizen of the United States. Now this defendant is a citizen, but he has not given bond, and therefore if he manufactured opium he has offended against this statute.

That brings me back to the point I stated just a moment ago. Did he manufacture opium? Now you will see the question is exactly as it has been stated to you, in effect, by counsel on both sides. Did he do no more than buy opium already prepared for smoking and moisten it, so that it might be capable of being rolled into pills and smoked? If that is all he did it is not contended that that was a process of manufacture. Or did he take the refuse matter—"Yen-shee" as it has been called—what is left over after a pipe has been used for the first time, and add to it a small portion, or some portion, of the manufactured material, and then reduce the mixture by the process of boiling and evaporation into a condition where it could be used a second time? If he did that, he manufactured. I do not profess to give you an exhaustive definition of the word, but "manufacture" consists in part at all events, in taking material and arranging or rearranging it, by manual or mechanical skill, by the application of machinery, or by calling in chemical laws. The product is a manufactured product; whether the process be simple or complicated, it is nevertheless a process of manufacture.

This act of Congress has made it an offense for any person to manufacture, and therefore if the defendant manufactured it for his own use, he comes within the letter of the statute. It is not necessary that he should have manufactured it for the purpose of sale or for profit; but, I repeat, if he manufactured it for his own use, it comes precisely within the letter of the statute.

I do not know that I can do more to bring your minds to the exact point in the case, which is just this—which did this man do of the two things that have been spoken of here in the evidence? Did he simply use a wet cloth for the purpose of moistening the opium that had already been prepared? If that is all he did, he has been guilty of no offense. Did he take the refuse material that he had previously used, mix it with a portion of smoking opium, and then reduce the mass thus composed to a substance that could be used again? If he did that, he manufactured smoking opium. If he did not, he is guilty of no offense.

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No. 943.

In the Supreme Court of the United States.

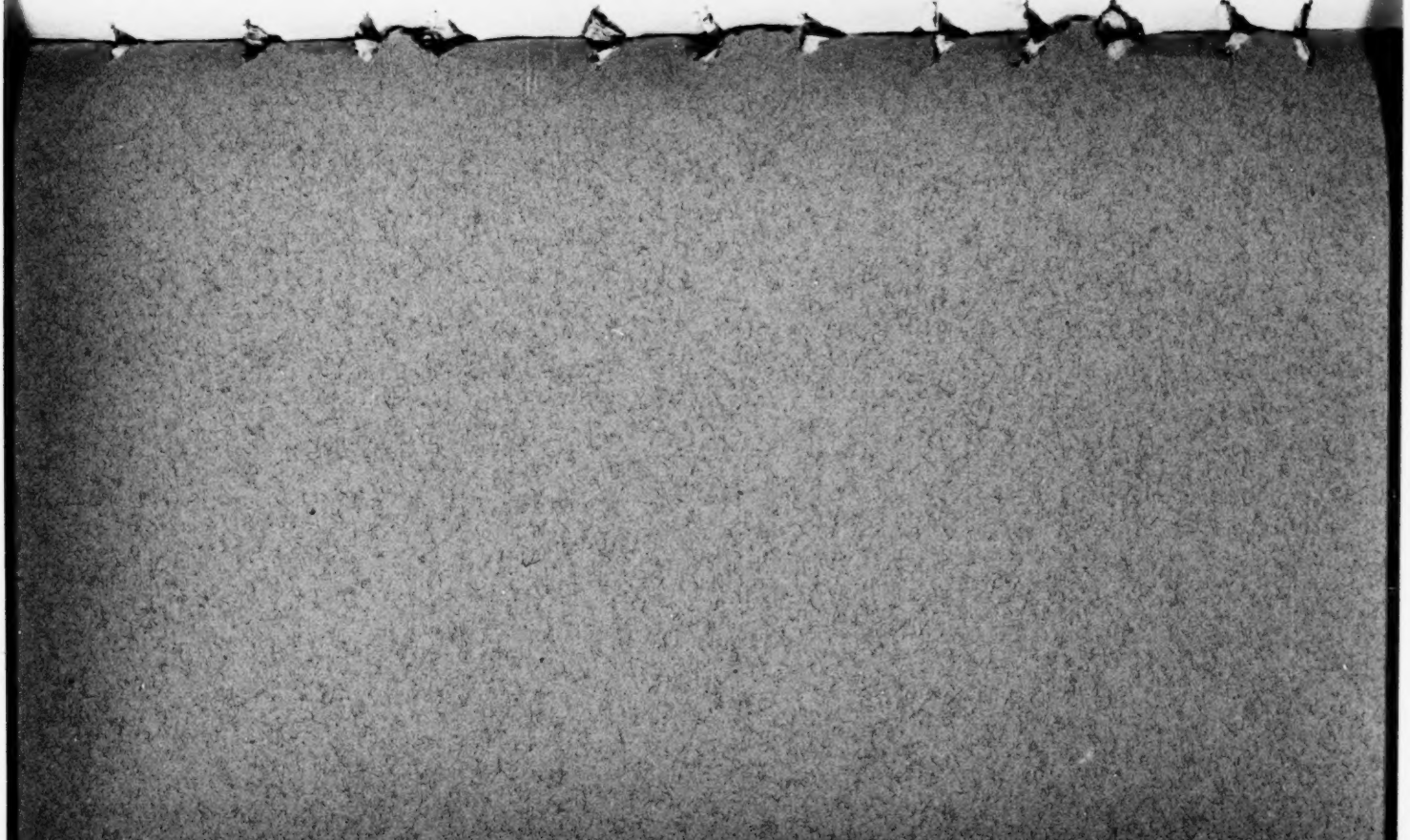
OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

ALFRED SHELLEY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.



IN THE

Supreme Court of the United States.

THE UNITED STATES, PLAINTIFF IN ERROR,
against
ALFRED SHELLEY.
No. 943.

Statement.

The defendant was indicted for manufacturing smoking opium without having complied with the provisions of the Internal Revenue Law therefor.

The indictment contained four counts. The second count charged the manufacturing of opium by use of yen shee, and the third count charged the manufacturing of opium by use of yen shee and smoking opium.

The defendant demurred to the second and third counts upon the ground that they did not state facts sufficient to charge a crime. The demurrer was sustained and the government brings the case to this Court on a writ of error.

The smoking opium is in liquid form, resembling much in appearance thick molasses, and the process of smoking is not a burning but rather an evaporation of the opium by holding it in the flames of an oil lamp, and the process consists in inhaling the fumes or vapor that is thrown off, leaving a powder substance which is known as yen shee. This substance does not differ chemically from smoking opium and the smoking opium can be smoked two or three times by simply adding water to this residue or yen shee and boiling it down.

However, by adding a small quantity of smoking opium to the yen shee each time it is boiled down, the product may be used four or five times. These are the processes set forth in the second and third counts of the indictment.

The indictment herein is a superseding indictment. The defendant was heretofore indicted upon the same charge and upon the trial of that case the evidence disclosed the facts as herein stated. The Trial Court denied defendant's motion to direct a verdict at the close of the trial and the jury brought in a verdict of guilty. However, the Trial Court, owing to the doubtful construction of the statute, granted an appeal to the Circuit Court of Appeals and a stay and admitted the defendant to bail pending the appeal. The Circuit Court of Appeals reversed the judgment of conviction and held that the process therein described was not a violation of the statute. (*U. S.* v. *Shelley*, 198 Fed., p. 88.) Thereafter this indictment was found and the defendant demurred with the result herein stated.

POINT I.

The mixing of yen shee and smoking opium and diluting with water and boiling down is not manufacturing opium for any purpose.

Section 36 of the act under which defendant was convicted reads in part as follows:

> "That an internal revenue tax of $10.00 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes."

It will thus be observed that a careful analysis of this statute prohibits the manufacturing of opium to be used for smoking purposes, and it is the opium, the manufacturing of which is prohibited and the process by which opium is manufactured is well understood, and it

is converting the juice of the poppy into the product known as opium. Of course, it may be urged that Congress intended to prevent preparing opium so it could be smoked when it framed this statute, but it being a criminal statute it cannot be enlarged beyond its plain language. If Congress meant to prohibit the process of preparing opium so that it could be smoked, it should have so said and the statute should read, a tax of $10.00 per pound shall be levied upon all opium that is prepared in this country so that it can be smoked, but it does not so state. The language of the statute is, a tax of $10.00 per pound upon all opium manufactured in the United States for smoking purposes. Clearly the defendant did not manufacture the opium as it is conceded that there is no chemical difference between yen shee and smoking opium. They are both opium.

And the opium was not manufactured by the defendant, all that he did was to take these two products, yen shee and smoking opium, both of which were opium, and add water to them and cook them.

The defendant had a right to buy smoking opium in the first instance; if he had a right to buy it, he had a right to use it, and he had a right to use it to its fullest capacity. Upon the former trial it appeared that he could use it from three to five times; that is, smoke it from three to five times, by adding water and cooking it over. Can it be said to do this would be criminal?

Would Congress have the right to pass a law prohibiting the defendant from enjoying exclusively and to the full, the use of his property? When he purchased the property it was smoking opium prepared for smoking purposes, and could be smoked several times. Clearly he would have the right to cook yen shee, thus putting it in shape so that he could smoke it the second or third time, or until he had exhausted its virtues. The process of smoking the opium simply being a process of evaporation; the smoker enjoying the fumes that are given off with the vapor in the process of evaporation, and all the

smoker does is to wet the residue or yen shee and boil it down again, then the process of smoking or evaporation is renewed and the opium changed from the liquid to powder form, and these two processes are repeated until all of the good is extracted from the opium.

It seems to me that the process of cooking yen shee as above described cannot be called the manufacturing of opium for smoking purposes, and if this is so, adding to the yen shee smoking opium which is already manufactured into smoking opium and cooking the two products together again cannot be termed the manufacture of opium.

At the close of the charge on the trial, defendant's counsel made the following request to charge:

> "I respectfully ask your Honor to charge the jury that the mixing of smoking opium together with the residue of opium that has been smoked, and cooking that, is not manufacturing opium within the meaning of the statute.
>
> "The Court: By that, Mr. Moore, I take it you mean the process of preparing the product fit for smoking out of yen shee plus other smoking opium?
>
> "Mr. Moore: Yes, sir.
>
> "The Court: The two substances diluted with water and then boiled down?
>
> "Mr. Moore: Yes, sir.
>
> "The Court: I decline to charge that, and you may have an exception."

As the opinion of the Circuit Court of Appeals in that case is short, we herewith quote it in full:

> "LACOMBE, C. J.:
>
> "Smoking opium is produced from crude opium by a process which we held in *Marks* v. *United States* (decided April 12th, 1912) constituted a manufacture within the meaning of the statute. It appears that when smoking opium has been produced, it may be smoked more than once. That is to say, the

residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as yen shee) some additional smoking opium is added each time it is re-heated the process of re-smoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked and heating the same is not a 'manufacture of *opium* for smoking purposes' within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended he operated, in its unsmoked and smoked condition.

"From an examination of the record it would seem that defendant was correct in contending that he used no *crude* opium, although occasionally a witness in answering some question uses the word 'opium,' without qualifying it as 'crude' or 'smoking.' But if there was so much doubt on this point, that it should have been sent to the jury to decide the question, then we think there was error in the refusal to charge that if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute."

It is respectfully submitted that the demurrer should be sustained.

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UNITED STATES v. SHELLEY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 943. Argued April 11, 1913.—Decided May 26, 1913.

The mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a manufacture of opium for smoking purposes within the meaning of § 36 of McKinley Tariff Law of October 1, 1890.

Criminal statutes ought not to be extended by construction.

A statute which is primarily designed as a taxing act to raise revenue on, and not one to suppress the manufacture of, a specified article, will not be construed so as to subject the same substance more than once to the tax or to require surveillance over places where the secondary treatment is conducted as well as over the factory of primary manufacture.

The prohibition against manufacturing smoking opium under § 36 of the Tariff Act of 1890 is not more extensive than the clause taxing the article; and if the article produced is not taxable thereunder there is no violation thereof in its production.

THE facts, which involve the construction of provisions of § 36 of the McKinley Tariff Law in regard to the manufacture of opium, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

Mr. Robert M. Moore for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment of the District Court sustaining a demurrer to two counts of an indictment for a violation of § 36 of the act of Congress approved October 1, 1890, c. 1244, 26 Stat. 567, 620.

This act is the so-called McKinley Tariff Law, and provided for the tariff duties to be paid upon articles imported from foreign countries, and also for the collec-

tion of certain internal revenue taxes. The tariff provisions are of course long since superseded. Section 36 reads as follows: "That an internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue."

The counts in question are the second and third counts of the indictment. The former of these avers (omitting formal matters) that, without having given bond, etc., the defendant "did engage in the manufacture of opium for smoking purposes, in and by employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for smoking

purposes, against the peace of the United States and their dignity, and contrary to the form of the statute," etc.

The third count charges that the defendant, without having given bond, etc., "did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against," etc.

This indictment seems to have been framed with the object of indirectly reviewing *Shelley* v. *United States*, 198 Fed. Rep. 88, where the Circuit Court of Appeals for the Second Circuit reversed a conviction that had been had in the District Court under a previous indictment, upon

grounds succinctly expressed in the opinion, as follows (p. 89): "It appears that, when smoking opium has been produced, it may be smoked more than once. That is to say, the residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as yen shee) some additional smoking opium is added, each time it is reheated, the process of resmoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same is not a 'manufacture of opium for smoking purposes' within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition. . . . We think there was error in the refusal to charge that, if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute."

It appears that the primary manufacture of opium for smoking purposes is done by treating crude opium in such manner as to convert it into a different form, thus rendering it fit for smoking. It is conceded that this manufacture is subject to the tax prescribed by § 36 of the act of 1890. And see *Marks* v. *United States*, 196 Fed. Rep. 476. The counts now under consideration describe two processes by which the residuum of opium remaining after smoking (yen shee), may be reconverted into a form fit for smoking, in the one case by dissolving it in water, straining and purifying the solution so as to remove foreign matter, and then heating and cooking the refined solution, and thereby producing an inferior grade of smoking opium; the other process differs in that an admixture of smoking opium of a high grade is employed together with the yen shee.

In the argument counsel discussed the proper definition of the term "manufacturing," citing *Kidd* v. *Pearson*, 128 U. S. 1, 20; and *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 14; to which may be added *Anheuser-Busch Assoc.* v. *United States*, 207 U. S. 556, 559, which had to do with the drawback provision of the McKinley law (26 Stat. 567, 617, c. 1244, § 25).

But, aside from the general principle that criminal statutes ought not to be extended by construction, we have here the additional consideration that this statute was primarily designed as a taxing act. Section 36 must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue, and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that if (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes, it intended to subject the same substance more than once to the tax, or to require surveillance over opium-smoking resorts—in which, it would seem, such treatment of the residuum might most readily be conducted—the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted.

Of course the prohibition is not more extensive than the taxing clause; and so we are satisfied that the offences charged in the second and third counts of this indictment are not within the denunciation of § 36 of the act.

Judgment affirmed.